CIMB Bank Bhd v Comsa Layer Farms Sdn Bhd & Anor

HIGH COURT (TAWAU) — CIVIL NO T(22) 58 OF 2007
JWS KO JC
25 NOVEMBER 2009

Civil Procedure — Judgment — Default judgment — Appeal against dismissal of application to set aside — Whether delay in application to set aside default judgment — Whether there were valid reasons for delay — Whether judgment properly served on defendants — Whether bona fide triable issues raised — Whether fit and proper case for exercise of court's discretion under O 62 r 1(1) of the Rules of the High Court 1980 to dispense with service of judgment in default — Rules of the High Court 1980 O 42 r 13, O 62 rr 1 & 6

Civil Procedure — Service — Regular writ service — Failure to serve writ of summons at registered address of defendants — Service of writ of summons at address given in facility agreement — Whether good service — Whether service of second defendant's writ at first defendant's business address good service — Rules of the High Court 1980 O 10 r 3(1)(b)

The first defendant was granted a loan facility by the plaintiff. This loan facility was evidenced by a facility agreement executed by the plaintiff bank and the first defendant as the borrower. Comsa Farms Bhd ('the second defendant'), the holding company of the first defendant, executed a guarantee and indemnity agreement ('the guarantee agreement') guaranteeing this loan facility. When the first defendant defaulted, the plaintiff bank commenced a writ action against the first defendant borrower and the second defendant guarantor. The writ was served on the first defendant by AR registered post at three addresses, namely the address adopted by the first defendant under section 19 of the facility agreement ('the contractual address'), the first defendant's former registered office and another address. The writ was also served on the second defendant by registered post at three addresses, namely the second defendant's place of business, which was allegedly the first defendant's business address, the second defendant's former registered office and another address. When the defendants failed to enter an appearance the plaintiff entered judgment in default of appearance against the defendants. The defendants then applied to set aside the judgment in default of appearance and prayed for leave to enter their defence. However, the defendants' application was dismissed and hence this appeal. The defendants submitted that as the writ of summons was not served at or sent to the registered office of the defendants as lodged at the Companies Registry at the material time, there was no proper service of the

writ of summons. The defendants further submitted that the non-production of the AR cards by the plaintiff ought to operate unfavourably against the plaintiff. The plaintiff rebutted the defendants' contention of bad service of the writ by relying on sections 19.1 and 19.2 of the facility agreement, which required any notice and legal process to be served at the address provided by the borrower in the agreement ('the contractual address'). The plaintiff also relied on cl 5 of the second defendant's guarantee agreement which provided that the service of any notice on the first defendant would be regarded as good service on the second defendant, because the first defendant had been constituted as the agent of the second defendant to accept service. Thus the plaintiff argued that since one of the three addresses at which the second defendant's writ was served was the business address of the first defendant there had been good service of the writ on the second defendant as well. The plaintiff also raised an objection that the defendants had failed to set aside the judgments in default within 30 days of receipt of the judgment in compliance with O 42 r 13 of the Rules of the High Court 1980 ('RHC'). In reply the defendants disputed service of the judgment upon them and submitted that the 30 days required under O 42 r 13 of the RHC did not run until such service.

Held, dismissing the defendants' appeal with costs:

(1) Notwithstanding the multiplicity of addresses used by the plaintiff, the plaintiff's service of the writ on the first defendant using the contractual address had fully complied with O 10 r 3(1)(b) of the RHC. It was also noted that it was not the legislative intention by s 350 of the Companies Act 1965 to limit service for a company to its registered address, when any service based on O 10 r 3(1)(b) of the RHC at the contractual address was also good. The first defendant had agreed to be served at the contractual address under section 19 of the facility agreement and there had been compliance with this contractual requirement of service of the writ on the first defendant. Further, the plaintiff was not contractually bound under the facility agreement to produce the AR cards as contended by the defendants even if service of the writ was effected by AR registered post. The deeming of service by the facility agreement as reinforced by O 10 r 3(1)(b) of the RHC were not meant to be and could not be contradicted by evidence of non-receipt of the writ by the first defendant (see paras 5, 10, 12, 14–15 & 19).

(2) There was also no merit in the second defendant's contention that failure to serve the writ at its registered address was bad. By cl 5 of the guarantee agreement, the first defendant had been constituted as the second defendant's agent to accept service and since the plaintiff had effected service of the writ on the first defendant's business address, the service effected on the second defendant was regular. There had been good service of the writ at the second defendant's business address or principal office or alternatively through the first defendant as the agent for the

second defendant. The evidence also seemed to support the fact that the second defendant was aware of the writ and the judgment in default that followed (see paras 24 & 37–38).

(3) It was found that there were no bona fide triable issues for setting aside the judgment in default. The defendants' letter of settlement to the plaintiff bank was in effect an unconditional admission to settle the judgment debt rather than to negotiate liability under the writ for the debt (see paras 41–42).

(4) There was no explanation offered by the defendants on their delay in not applying to set aside the judgment in default within the 30 days limitation except for the challenge that a copy of the judgment had not been properly served on them at their registered offices. However, based on the wording 'receipt' in O 42 r 13 of the RHC, there must be actual service of a copy of the judgment upon the defendants before the 30 day period starts to run. The principal had effected service of the judgment upon the defendants at their business address or principal office and based on O 62 r 6(1) and (2) of the RHC, this would be sufficient and the failure to serve at the registered address was not mandatory. Even if the defendants had not been served a copy of the judgment, the judgment was brought to their attention by the winding up notices founded on the judgment, which were served on the defendants. The defendants' application to set aside the judgment in default had failed by their non-compliance of O 42 r 13 of the RHC and in such a case the issue as to whether the defendants had merits in their proposed defence was irrelevant (see paras 56, 73–76 & 80).

(5) Further, the present case was a fit and proper case for the exercise of the court's discretion under O 62 r 1(1) of the RHC to dispense with service of a copy of the judgment in default upon the defendants. In the circumstances, no prejudice had been visited on the defendants by the non-service of a copy of the judgment in default and apparent waiver (see para 79).

[Bahasa Malaysia summary

Defendan pertama diberikan kemudahan pinjaman oleh plaintif. Kemudahan pinjaman tersebut disokong oleh perjanjian kemudahan yang ditandatangani oleh bank plaintif dan defendan pertama sebagai peminjam. Comsa Farms Bhd ('defendan kedua'), syarikat induk defendan pertama, menandatangani perjanjian jaminan dan indemniti ('perjanjian jaminan') menjamin kemudahan pinjaman. Apabila defendan pertama gagal membayar, bank plaintif memulakan tindakan writ terhadap defendan pertama dan penjamin defendan kedua. Writ tersebut diserahkan kepada defendan pertama secara pos berdaftar AR ke tiga alamat, iaitu alamat yang digunakan oleh defendan pertama di bawah seksyen 19 kemudahan perjanjian ('alamat kontrak'),

pejabat berdaftar terdahulu defendan pertama dan satu lagi alamat. Writ tersebut juga diserahkan kepada defendan kedua secara pos berdaftar ke tiga alamat iaitu, tempat perniagaan defendan kedua, yang didakwa adalah alamat perniagaan defendan pertama, alamat berdaftar terdahulu defendan kedua dan satu lagi alamat. Apabila defendan-defendan gagal memasukkan kehadiran, plaintif memasukkan penghakiman ingkar kehadiran terhadap defendan-defendan. Defendan-defendan kemudian memohon untuk mengenepikan penghakiman ingkar kehadiran dan memohon untuk kebenaran untuk memfailkan pembelaan. Walau bagaimanapun, permohonan defendan-defendan ditolak dan maka rayuan ini. Defendan-defendan menghujah bahawa oleh kerana writ saman tidak diserahkan atau dihantar ke pejabat berdaftar defendan-defendan seperti yang dilaporkan di pendaftar syarikat pada masa material, tidak ada penyerahan yang wajar writ saman tersebut. Defendan-defendan selanjutnya menghujah bahawa kegagalan mengemukakan kad-kad AR oleh plaintif sepatutnya memberikan keputusan yang tidak memihak kepada plaintif. Plaintif mematahkan hujahan defendan-defendan mengenai penyerahan yang cacat dengan menyandar kepada seksyen-seksyen 19.1 dan 19.2 perjanjian kemudahan, yang memerlukan apa-apa notis dan proses undang-undang perlu diserahkan ke alamat yang diberikan oleh peminjam di dalam perjanjian ('alamat kontrak'). Plaintif juga menyandar atas klausa 5 perjanjian jaminan defendan kedua yang memperuntukkan bahawa penyerahan apa-apa notis ke atas defendan pertama akan dianggap sebagai penyerahan yang baik ke atas defendan kedua, kerana defendan pertama telah dilantik sebagai ejen defendan kedua untuk menerima penyerahan. Oleh itu plaintif menghujah bahawa oleh sebab salah satu daripada tiga alamat di mana writ defendan kedua diserahkan adalah alamat perniagaan defendan pertama, terdapat penyerahan yang baik writ tersebut ke atas defendan kedua. Plaintif juga membangkitkan bantahan bahawa defendan-defendan telah gagal mengenepikan penghakiman ingkar dalam masa 30 hari dari tarikh penerimaan penghakiman mematuhi A 42 k 13 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Dalam jawapannya defendan-defendan mempertikaikan penyerahan penghakiman kepada mereka dan menghujah bahawa 30 hari yang diperlukan di bawah A 42 k 13 KMT tidak bermula sehingga penyerahan tersebut.

Diputuskan, menolak rayuan defendan-defendan dengan kos:

(1) Walaupun beberapa alamat digunakan oleh plaintif, penyerahan plaintif bagi writ ke atas defendan pertama menggunakan alamat kontrak mematuhi secara sepenuhnya A 10 k 3(1)(b) KMT. Ia juga diakui bahawa bukan niat perundangan melalui s 350 Akta Syarikat 1965 untuk mengehadkan penyerahan untuk syarikat kepada alamat berdaftarnya, apabila apa-apa penyerahan berdasarkan A 10 k 3(1)(b) KMT ke alamat kontrak juga adalah baik. Defendan pertama bersetuju untuk diserahkan di alamat kontrak di bawah seksyen 19 perjanjian kemudahan dan

terdapat pematuhan dengan keperluan kontrak ini untuk penyerahan writ ke atas defendan pertama. Selanjutnya, plaintif tidak terikat secara kontrak di bawah perjanjian kemudahan tersebut untuk mengemukakan kad-kad AR seperti yang dihujahkan oleh defendan-defendan walaupun penyerahan writ dilakukan secara pos berdaftar AR. Anggapan penyerahan oleh perjanjian kemudahan seperti yang diperkukuhkan lagi oleh A 10 k 3(1)(b) KMT KMT tidak diniatkan untuk dan tidak boleh dicanggah oleh keterangan tidak penerimaan writ oleh defendan pertama (lihat perenggan 5, 10, 12, 14–15 & 19).

(2) Juga tidak ada merit di dalam hujahan defendan kedua bahawa kegagalan menyerahkan writ ke alamat berdaftarnya adalah cacat. Melalui klausa 5 perjanjian jaminan, defendan pertama telah dilantik sebagai ejen defendan kedua untuk menerima penyerahan dan oleh sebab plaintif telah melakukan penyerahan writ ke alamat perniagaan defendan pertama, penyerahan yang dilakukan ke atas defendan kedua adalah baik. Terdapat penyerahan betul writ ke alamat perniagaan atau pejabat utama defendan kedua atau secara alternatifnya melalui defendan pertama sebagai ejen kepada defendan kedua. Keterangan juga kelihatan menyokong fakta bahawa defendan kedua mengetahui mengenai writ tersebut dan penghakiman ingkar yang berikutnya (lihat perenggan 24 & 37–38).

(3) Didapati bahawa tidak ada isu bona fide yang boleh dibicarakan untuk mengenepikan penghakiman ingkar tersebut. Surat-surat penyelesaian defendan-defendan kepada bank plaintif adalah sebenarnya pengakuan tidak bersyarat untuk menyelesaikan penghakiman daripada untuk menawar liabiliti di bawah writ untuk hutang (lihat perenggan 41–42).

(4) Tidak ada penjelasan yang ditawarkan oleh defendan-defendan atas kelewatan bagi kegagalan memohon untuk mengenepikan penghakiman ingkar dalam tempoh had masa 30 hari kecuali mencabar bahawa salinan penghakiman tidak diserahkan secara wajar kepada mereka di pejabat berdaftar mereka. Walau bagaimanapun, berdasarkan kepada perkataan 'receipt' di dalam A 42 k 13 KMT, perlu ada penyerahan sebenar salinan penghakiman kepada defendan-defendan sebelum tempoh 30 hari bermula. Plaintif telah membuat penyerahan penghakiman kepada defendan-defendan ke alamat perniagaan atau pejabat utama dan berdasarkan A 62 k 6(1) dan (2) KMT, ini adalah mencukupi dan kegagalan untuk menyerahkan ke alamat berdaftar adalah tidak mandatori. Walaupun defendan-defendan tidak diserahkan dengan salinan penghakiman, penghakiman tersebut di bawa ke perhatian mereka melalui notis penggulungan yang berdasarkan kepada penghakiman tersebut, yang diserahkan kepada defendan-defendan. Permohonan defendan-defendan untuk mengenepikan penghakiman ingkar tersebut telah gagal disebabkan oleh ketidakpatuhan mereka

kepada A 42 k 13 KMT dan di dalam keadaan demikian isu sama ada defendan-defendan mempunyai merit di dalam pembelaan yang dicadangkan mereka tidak relevan (lihat perenggan 56, 73–76 & 80).

(5) Selanjutnya, kes ini adalah kes yang sesuai dan wajar untuk pelaksanaan budi bicara mahkamah di bawah A 62 k 1(1) KMT untuk mengetepikan penyerahan salinan penghakiman ingkar ke atas defendan-defendan. Dalam keadaan ini, tidak ada prejudis kepada defendan-defendan dengan kegagalan penyerahan salinan penghakiman ingkar dan penepian yang jelas (lihat perenggan 79).]

Notes

For cases on default judgment, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4209–4249.

For cases on service in general, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6683–7045.

Cases referred to

Affin Bank Bhd v Major Galaxy Sdn Bhd & Ors [2006] 2 MLJ 466; [2006] 5 CLJ 73, HC (refd)

Amanah Merchant Bank v Lim Tow Choon [1994] 1 MLJ 413, SC (refd)

Anthony Goh Khiok Loong (suing by his father and next friend, Goh Kok Hua) v Chan Yam Heng & Anor [2007] 1 MLJ 140; [2006] 7 CLJ 309, HC (refd)

Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors [2002] 7 MLJ 430; [2002] 2 AMR 1724, HC (refd)

Evans v Bartlam [1937] AC 473, HL (refd)

Hasil Bumi Perumahan Sdn Bhd v United Malayan Banking Corp Bhd [1994] 1 MLJ 312, SC (refd)

Hong Leong Finance Bhd v Travers Development Sdn Bhd [2001] 5 MLJ 268; [2001] 1 CLJ 123, HC (refd)

Lee Boon Tatt & Ors v Takhdir Trading Sdn Bhd [1984] 2 MLJ 341, HC

MBF Finance Bhd v Hasmat Properties Sdn Bhd & Ors [1990] 1 MLJ 180; [1990] 2 CLJ (Rep) 461, HC (not folld)

MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd [1993] 1 MLJ 290, HC (refd)

Mohd Adli bin Maaris & Anor v Hong Leong Finance Bhd [2006] 1 MLJ 303; [2005] 8 CLJ 398, HC (refd)

Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors [1989] 1 MLJ 47, HC (not folld)

TA Securities Bhd v Ng Yen Ling [2000] 3 MLJ 743; [2001] 1 CLJ 102, HC (refd)

Tan Chong Soon v Ng Kin Hwa [2001] MLJU 580; [2002] 5 CLJ 195, HC (refd)

Yeo Hiap Seng v Australian Food Corp Pte Ltd & Anor [1991] 1 MLJ 144, HC (refd)

Legislation referred to

Companies Act 1965 ss 4(1), 350
Housing Developers (Control and Licensing) Act 1966
Rules of the High Court 1980 O 10 rr 2, 3(1)(b), O 42 r 13, O 45 rr 1(1)(e), 5, 7, 7(3), 13(1), O 62 rr 1, 1(1), 3, 4, 4(1), 4(1)(b), 6(1), (2), 10

Suzana bt Mohammad Shuhaimi (Fernandez & Co) for the respondent/plaintiff.
Liew Hon Min (Liew Hon Min & Co) for the appellants/defendants.

JWS Ko JC:

[1] I dismiss the appellants'/defendants' appeal in chambers against the 30 ruling of the senior assistant registrar in dismissing the defendants' application to set aside judgment in default of appearance and for leave to enter defence and/or counterclaim:

SERVICE OF WRIT

Significance of registered office

[2] Counsel for the defendants has strongly relied on the failure of the plaintiff to serve the writs to them by AR registered post to their respective registered office addresses which would be reliance on Companies Act 1965 s 350 which is also repeated in part by O 62 r 4(1)(b) of the RHC 1980.

[3] It is noted that the plaintiff's affidavit of service affirmed 30 November 2007 for service of the writ upon the first defendant (exh CLF3 of the defendants' affidavit in support of Datuk Kour Nam Ngum affirmed 5 March 2009) is fraught with errors on the date of service in relation to the exhibited registered post slips. Noted also that the plaintiff was peppering each of the defendants with due process in the matter through three different addresses.

[4] It has been held by Mohamed Dzaiddin J (as he then was) in *Lee Boon Tatt & Ors v Takhdir Trading Sdn Bhd* [1984] 2 MLJ 341 that it is not the legislative intention by s 350 of the Companies Act 1965 to limit service for a company to its registered office, a plaintiff may still elect to serve under O 62 r 4(1)(b) which 'says if there be more offices than one, then service may be effected at the principal office which should mean the principal place of business of the corporation'.

[5] Notwithstanding the multiplicity of addresses used by the plaintiff, there is no dispute by the parties that the writ of summons was not served at or sent to the registered office of the defendants as lodged at the Companies Registry

at the material time as No 30, Lorong 6A/91, Taman Shamelin Perkasa, 56100 Kuala Lumpur.

Contractual address for service of the first defendant

[6] The defendant's contention of bad service on the first defendant is adequately rebutted by the plaintiff's contention that they are relying on service using an agreed address for service or for convenience here called the contractual address adopted by the first defendant as the borrower under section 19 of the facility agreement (exh 'ASM3' of the plaintiff's affidavit in opposition of Aanatha Sambu a/l Mayavu affirmed 10 April 2009), which states as follows:

19.1 Service of Notice And Legal Process

(i) The service of any notice and Legal Process may be given by prepaid registered or ordinary post sent to the respective address or addresses specified in Section 19.2 and such notice and Legal process shall be deemed to have been duly served after the expiration of five (5) days from the date it is posted and if delivered by hand, on the day it was delivered.

(ii) No change in the address howsoever brought about shall be effective or binding on either party unless that party has given to other actual notice of the change of address or addresses …

19.2 Address

(i) The Borrower

TB266 Lot 4, Third Floor, Block 27, Fajar Complex, Jalan Mahkamah, 91000, Tawau, Sabah.

[7] It must be noted that the wording of section 19 of the facility agreement is that process 'may be given' and therefore not mandatory to be used. This means that the plaintiff may resort to other addresses for service and is not restricted to having to send to the contractual address for service to be effective.

[8] On the facts here, in the writ of summons, at para 2, the first defendant was stated as having its address for service at the contractual address.

[9] According to the affidavit of service affirmed 30 November 2007 (exh CLF3 of the defendants' affidavit in support), the writ was sent by AR registered post to the first defendant at the contractual address in addition to a former registered office and another address on 17 October 2007 but the postal slip stamps it as 22 October 2007. Nonetheless, thereafter the judgment in default of appearance was entered against the first defendant on 30 November 2007 well after the stipulated time for entering appearance whether from 17 or 22 October 2007.

[10] The plaintiff's service of the writ on the first defendant using the contractual address in this respect has fully complied with O 10 r 3(1)(b) of the RHC 1980:

> 3 Service of writ in pursuance of contract
>
> (1) Where —
>
> (b) the contract provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the defendant, or such other person as may be so specified in the contract, in such manner or at such place (within or out of the jurisdiction) as may be specified,
>
> then if an action in respect of the contract is begun in the High Court by which it is begun is served in accordance with the contract the writ shall, subject to paragraph (2), be deemed to have been duly served on the defendant.

[11] Counsel for the plaintiff had further supported her contention for continued usage of the same contractual address by reference to the plaintiff's letter of offer dated 16 February 2005 (exh ASM5 of the plaintiff's affidavit in opposition) for the conversion of the previous facility granted in respect of the facility agreement which had been sent to the contractual address. This appears to have been received by the defendants and in fact accepted and returned by both defendants without any protest or request of change of the contractual address on this letter, if it was erroneous or no longer correct by then.

[12] Following *Lee Boon Tatt & Ors v Takhdir Trading Sdn Bhd* that it is not the legislative intention by s 350 of the Companies Act 1965 to limit service for a company to its registered office, any service based on O 10 r 3(1)(b) of the RHC 1980 at the contractual address is also good.

[13] There has been compliance with the contractual requirement of service by the plaintiff through AR registered post and that is adequate service whether the first defendant received the writ or can show otherwise (see also the case of *TA Securities Bhd v Ng Yen Ling* [2000] 3 MLJ 743; [2001] 1 CLJ 102); unless the defendants can show any reason to the contrary why they are not bound by this mode of contractual service. There is nothing in their two affidavits filed as to why the contractual service cannot be relied on by the plaintiff; the defendants are bound by the term for contractual service of the writ on the first defendant as effected by the plaintiff under section 19 of the facility agreement.

[14] The two cases cited by the defendants: *Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors* [1989] 1 MLJ 47 and *MBF Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180; [1990] 2 CLJ (Rep) 461 requiring the AR cards to be produced if sent by AR registered post is not authority to

override the express contractual provision of section 19 of the facility agreement. Section 19 deems the writ as received five days after being sent and so long as it is sent by prepaid registered post, even if for that matter AR registered post is used. Posting by registered post is the only contractual requirement of section 19 of the facility agreement. Since it is not a term of section 19 as a contractual requirement to produce the AR cards, the plaintiff is not contractually bound to produce them as contended by the defendants even if it was sent them by AR registered post in order to prove effective service. In *Amanah Merchant Bank v Lim Tow Choon* [1994] 1 MLJ 413 it was held that when demand had been sent in accordance with the contract term and once the deeming provision applied it was not necessary to show that the AR card has been returned duly acknowledged for there to be effective service of the demand. Under the circumstances the court cannot compel the plaintiff to produce the AR cards nor to view this non-production unfavourably against the plaintiff who is acting within their contractual rights.

[15] Further, this deeming of service by the facility agreement and reinforced by O 10 r 3(1)(b) of the RHC 1980 is not meant to be and cannot be contradicted by evidence of non-receipt of the writ by the defendants. In *Mohd Adli bin Maaris & Anor v Hong Leong Finance Bhd* [2006] 1 MLJ 303; [2005] 8 CLJ 398 contractual service was held good even though the writ was returned unclaimed. This case negates the contention by the defendants' counsel of requiring the plaintiff to produce the AR or acknowledgement cards to prove actual receipt of the writ by the defendants which is not part of the mode of contractual address service provided in section 19 of the facility agreement as reinforced by O 10 r 3(1)(b) of the RHC 1980.

[16] It also therefore irrelevant if the contractual address can be shown to belong to another or not the defendants as contended by the defendants' counsel, so long as the defendants are shown to be aware of usage of the contractual address and make no attempt to rectify this error as required by section 19.1(ii) of the facility agreement.

[17] In the case of *Affin Bank Bhd v Major Galaxy Sdn Bhd & Ors* [2006] 2 MLJ 466; [2006] 5 CLJ 73 Vincent Ng J (as he then was), held that 'as the place where service was effected was the address provided by the first defendant as its official or registered address, it cannot be argued that the service was improperly effected. The rationale for this is simple since this was the address furnished by the first defendant; it is incumbent upon it to notify the plaintiff of any change of address, and until so notified this address should remain as its last known address'. See also *Hong Leong Finance Bhd v Travers Development Sdn Bhd* [2001] 5 MLJ 268; [2001] 1 CLJ 123 at p 129.

[18] In the same vein, the defendants cannot rely on the change of registered office lodged at the Companies Registry as required by law as notice to the plaintiff without officially extending a copy of the Form 44 to the plaintiff to change the contractual address. The first defendant still need to comply with section 19.1(ii) of the facility agreement which stated: 'No change in the address howsoever brought about shall be effective or binding on either party unless that party has given to other actual notice of the change of address or addresses …' This is so because the contractual address adopted by the first defendant is by choice and may not necessarily be and can be distinct from its registered office if it so preferred. This distinction is recognised by the provision of service either at the registered office and principal office in O 62 r 4(1)(b) of the RHC 1980. It would be different if in lieu of the specified contractual address of the first defendant at section 19.1(ii) of the facility agreement, the first defendant had inserted: 'At registered office'. Then service will always have to be at the latest registered office as lodged at the Companies Registry at time of service relying on such provision for contractual address service.

[19] The first defendant has agreed to be served at the contractual address by registered post and no evidence of notification of change had been served on the plaintiff in pursuance to section 19.1(ii) of the facility agreement to enable the defendants to complain of non-compliance with the contractual terms for service by the plaintiff. The posting by AR registered post to the contractual address provided in the facility agreement will be deemed good service of the writ upon the first defendant without need to produce the AR card.

Is the service of the second defendant bad?

[20] The plaintiff contends that the second defendant had been served by registered post at its alleged place of business at TB 265, Lot 4, 1st Floor, Block 27, Fajar Complex, Jalan Mahkamah, 91000, Tawau ('TB 265') together at a former registered office and another address by the plaintiff which are not its registered office.

[21] Order 62 rule 4(1)(b) of the RHC 1980 states that a writ may be served:

> (b) by sending a copy of it by registered post addressed to the corporation, or, if there be more offices than one at the 25 principal office of the corporation …

If service at TB 266, the contractual address of the first defendant

[22] The defendants contend in its counsels' submission that the registered slip (exh CLF5 of the defendants' affidavit in support) attached as 'SMS2' showed the address sent as TB 266, Lot 4, 3rd Floor, Block 27, Fajar Complex, Jalan Mahkamah ('TB 266') and not at its admitted business address at TB 265

even though their covering letter dated 9 October 2007 (exh CLF5 of the defendants' affidavit in support) attached as 'SMS1' is addressed to TB 265.

[23] It is noted that by the second defendant's guarantee and indemnity agreement dated 12 October 2000 (exh ASM4 of the plaintiff's affidavit in opposition) ('the second defendant's guarantee') at section 2 of the Schedule, the second defendant's address is given as TB 264, Lot 4, First Floor, Block 27, Fajar Complex, Jalan Mahkamah ('TB 264') whereas at section 5, the first defendant's address is given as TB 266.

[24] The first defendant has been constituted as the agent of the second defendant to accept service by cl 5 of the second defendant's guarantee:

> AGENT FOR SERVICE
>
> • Each of the Guarantors hereby irrevocably appoints the Borrower, as his/her agent for the service of any demand, notice, writ, summons, judgment or other legal process. The failure of such agent to give notice to any of the Guarantor/Guarantors of any such demand, notice or legal process will not affect or impair the validity of such proceedings or the judgments or orders based thereon. PROVIDED however that nothing contained in this clause shall be deemed to limit the right of the Bank to effect service of such demand, notice or legal process in any other manner permitted by the relevant law.

[25] Counsel for the plaintiff has submitted which I agree that if the writ was sent to TB 266 based on the postal slip which is the contractual address of the first defendant under section 19.2(i) of the facility agreement and also repeated in section 4 of the Schedule to the second defendant's guarantee then there is good service on the second defendant through the first defendant as its agent for service in pursuance to contract in accordance with O 10 r 3(1)(b) of the RHC 1980.

If service is at TB 265 being the business address

[26] The plaintiff's counsel further submitted that if the writ was served based on the address on the covering letter dated 9 October 2007 (exh CLF5 of the defendants' affidavit in support) which is at TB 265 there is still good service.

[27] The TB 265 address according to the defendants' affidavit in reply of Datuk Kour Nam Ngum affirmed 5 May 2009 at para 5(d) is the business address of the first defendant. The plaintiff in its writ at para 3 states this is the second defendant's address for service. The draft defence (exh CLF7 of the

defendants' affidavit in support of Datuk Kour Nam Ngum affirmed 5 March 2009) at para 3 offers a bare denial that TB 265 is not the second defendant's principal place of business.

[28] In the plaintiff's affidavit in opposition under exh ASM2 which is the company search from the Companies Commission of Malaysia of the second defendant as at 13 October 2006 shows in addition to its registered office at Suite 20.03 (A), 20th Floor, Menara MAA, No 12, Jalan Dewan Bahasa, 50460 Kuala Lumpur, under the separate business address entry in the register it is recorded as TB 265 with the Companies Commission.

[29] In the defendants' affidavit in reply, exh CLF11(c) which is the company lodgment Form 44 on change of registered office of the second defendant as at 22 December 2006 to No 30, Lorong 6A/91, Taman Shamelin Perkasa, 56100 Kuala Lumpur. There was no change documented at this date for the business address of the second defendant which appears therefore to remain as at TB 265.

[30] In the defendants' affidavit in support, exh CLF6 at p 1/7 which is the company search from the Companies Commission of Malaysia of the second defendant as at 6 August 2008 shows in addition to its latest registered office at 610, 6th Floor, Menara Mutiara Majestic, No 15, Jalan Othman, Petaling Jaya 46000, Selangor, its business address is still recorded in the company search as remaining at TB 265 with the Companies Commission.

[31] The second defendant incidentally is the holding company of the first defendant as its wholly owned subsidiary which is documented at p 4/14 of exh CLF4 of the defendants' affidavit in support. It is admitted by the parties and the documentations filed that TB 265 is the business address of the first defendant at all material times which because of their holding/subsidiary relationship would make it more probable for them to share the same business office, as they had in respect of sharing their registered office at the same address (see the defendants' affidavit in reply, exhs CLF10(a)–(c) and CLF11(b)–(d)).

[32] This act of sharing offices by the defendants is further supported by the defendants' letter dated 9 September 2008 (exh ASM10 of the plaintiff's affidavit in opposition) at the last page, the business address used by both defendants remains singularly at TB 265 in this document, the very same as where the second defendant had been served earlier. There is also nothing in this letter offering settlement by the defendants protesting that they were not aware of the writ served at TB 265 from which the judgment in default against the second defendant is based on.

[33] Further, other than a bare allegation in the draft defence, there is no evidence to the contrary shown from the defendants' affidavits that there has also been a change of the business address of the second defendant in the intervening period between 13 October 2006 and 6 August 2008 from TB 265 when the writ was posted there by AR registered post to the second defendant.

[34] In *Lee Boon Tatt & Ors v Takhdir Trading Sdn Bhd*, Mohamed Dzaiddin J (as he then was) on service under O 62 r 4(1)(b) of the RHC 1980 held that:

> The rule says if there be more offices than one, then service may be effected at the principal office which should mean the principal place of business of the corporation.

[35] In *Lee Boon Tatt*'s case, the plaintiff had relied upon and established the business office and principal office of the defendant from an address given in an advertisement of the defendant for sale of houses pursuant to the Housing Developers (Control and Licensing) Act and Rules. From *Lee Boon Tatt*'s case this can be further derived, that if a company seeks to put into public records, in this case the Companies Commission that its business address is at a certain address then such specified business address is self evident that it cannot be but otherwise then to be treated as its principal place of business. I would go further to add that such address specified as business address lodged with the Companies Commission will also be deemed to be its principal office for the purposes of O 62 r 4(1)(b) of the RHC. Even to the extent of taking judicial notice of this practice of inserting the business address put into effect by the Companies Commission as part of a company's lodgment for its company record and for the specified business address to be designated as its principal place of business for all intents and purposes.

[36] If that is the case, the second defendant having held out TB 265 as its business address at the Companies Commission, it cannot be allowed to turn around and deny that it is not its principal place of business even if it can be shown that it has been changed (which there is no evidence here) without first filing or notifying of a change at the Companies Commission. This public disclosure and duty can be equated to the same footing for the registered office where in the case of *Yeo Hiap Seng v Australian Food Corp Pte Ltd & Anor* [1991] 1 MLJ 144, it has been held that a change of registered office without the change being lodged at the Companies Registry will be ineffective (see also *MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd* [1993] 1 MLJ 290).

[37] There cannot be any dispute under the circumstances by the second defendant that TB 265 is not its place of business or for it to be construed as its principal office for the purposes of O 62 r 4(1)(b) of the RHC 1980. The

service effected on the second defendant at TB 265 by AR registered post by the plaintiff is regular. The evidence also seems to support the fact (the defendants' letter dated 9 September 2008: exh ASM10 of the plaintiff's affidavit in opposition) that the second defendant was aware of the writ and the judgment in default that followed.

Regular writ service

[38] There is no merit to the contention of the defendants that failure to serve the writs at their respective registered address is bad. There has been good service of the writs effected by the plaintiff at the first defendant's contractual address for the first defendant and at the second defendants business address or principal office or alternatively through the first defendant as its agent for the second defendant.

TRIABLE ISSUE

[39] The defendants must prove that there are bona fide triable issues for setting aside the judgment in default to enable them to enter appearance and file their defence (see *Evans v Bartlam* [1937] AC 473).

[40] In *Hasil Bumi Perumahan Sdn Bhd v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312, Tan Sri Jemuri Serjan CJ (Borneo) in supporting a higher standard said:

> the guidelines in *Evans v Bartlam* should be accepted. In our view, in order to succeed in his application … the applicant must show that he has a defence which has some merits and which the court must try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as a bona fide reasonable defence.

[41] Looking at the facts here, the defendants had not sought to deny nor explain why they had unequivocally admitted to the plaintiff's claim by their letter dated 9 September 2008 (exh ASM10 in the plaintiff's affidavit in opposition) ('the defendants' letter of settlement') when proposing settlement of the judgment without any hint of dispute as they now put forward. This fully supports the plaintiff's contention that there is no bona fide triable issue against the plaintiff's claim.

[42] An attempt was made by para 9 of the defendants' affidavit in reply to state that the defendants' letter of settlement was made on a 'without prejudice' basis and should be excluded. This is not borne out by the facts and the tone of the defendants' letter. The defendants' letter essentially mentioned awareness of the judgment dated 30 November 2007, never disputed anything arising

from this suit on service nor indebtedness from which the judgment arose and offered settlement of the judgment debt by monthly instalments and by other arrangements. The defendants' letter was made in the form of an unconditional admission to settle a judgment debt rather than to negotiate liability under the writ for the debt.

[43] The defendants did offer through exh CLF7 of the defendants' affidavit in support, a draft defence of bare denial of debt, purported unilateral withdrawal of the facilities and a dispute of actual amount owing. However these are only bare allegations without any supporting evidence in the defendant's affidavits on any of these purported defences to show that there is a bona fide triable issue of fact.

[44] Based on the defendants' letter of settlement which is an admission and submission of proposal for settlement for the judgment debt, I find that this is sufficient to overwrite the bona fides of the triable issue that may arise from the draft defence (exh CLF7) of the defendants.

[45] On this ground alone there was sufficient basis for not setting aside the judgment in default of appearance and dismissing the defendants' application to set it aside by the SAR.

[46] The second defendant in addition contended in its written submission that the notice of demand under the second defendants' guarantee had been sent to the wrong address and there was no valid demand to claim under it. According to para 18 of the plaintiff's affidavit in opposition, the demands (exhs ASM13–14) in the plaintiff's affidavit in opposition) had been sent amongst others to the business address TB 265 as provided to the Companies Commission and admitted by the defendants as their business address. Also this same business address was subsequently still used and as such validated by both defendants in their letter of settlement dated 9 September 2008 to the plaintiff (exh ASM10 in the plaintiff's affidavit in opposition). This should be deemed good service of this notice of demand for the reasons on service at the business address.

DELAY IN SETTING ASIDE

[47] Lastly, the plaintiff had raised an objection that the defendants had failed to set aside the judgment in default within 30 days of receipt of the judgment in compliance with O 42 r 13 of the RHC.

[48] The judgment in default of appearance according to O 42 r 13 of the RHC must be served on the defendants before 30 days to set it aside starts to run. The defendants' application to set aside was made on 5 March 2009.

Dispute as to the service of judgment

[49] The defendants disputed the service of the fair copy of the judgment upon them and that the 30 days of O 42 r 13 of the RHC does not run until such service. The defendants' counsel had incidentally requested for copies of this judgment by his letter dated 15 September 2008, exhs CLF12(a) and (c) of the defendants' affidavit in reply and alleged a failure of the plaintiff's solicitors to respond to their request.

[50] It is a fact that no service of the judgment in default was effected to both defendants was ever made through their registered office at No 30, Lorong 6A/91, Taman Shamelin Perkasa, 56100 Kuala Lumpur.

[51] According to section 19 of the facility agreement (exh ASM3 of the plaintiff's affidavit in opposition), TB 266 is the contractual address for service for the first defendant which appears not to have been used.

[52] Similarly, according to the guarantee and indemnity agreement (exh ASM4 of the plaintiff's affidavit in opposition) at the Schedule, TB 264, Lot 4, First floor, Block 27, Fajar Complex, Jalan Mahkamah 91000 Tawau (TB 264) is given as the address of the second defendant which appears not to have been used too.

Service at the business address

[53] According to the plaintiff's affidavit in opposition at para 5 on the 30 January 2008, the judgment in default was served by posting through AR registered post to the first defendant at TB 265 and another address (exh ASM8 of the plaintiff's affidavit in opposition) through cover of their letter dated 25 January 2008. The TB 265 address according to the defendants' affidavit in reply at paras 5(c) and (d) is the business address of the first defendant. This in accord with exh ASM1 ('the plaintiff's affidavit in opposition') read with exh CLF4 ('the defendants' affidavit in support) and the company searches from the Companies Commission of Malaysia records that the first defendant's business address as TB 265. The delay in setting aside the judgment in default would be more than a year for the service effected through TB 265.

[54] For the second defendant it was posted to its business address at TB 265 and two other addresses (see exh ASM9, bundle of the plaintiff's affidavit in opposition). The company searches from the Companies Commission of

Malaysia covering the material period shows that the second defendant's business address is documented as TB 265 (see exh ASM2 of the plaintiff's affidavit in opposition and exh CLF4 of the defendants' affidavit in support). In the defendants' affidavit in reply at para 6(f) there is no denial rightly so that TB 265 is the business address of the second defendant. TB 265 has already been found to be its business address or principal office for the purposes of serving the writ upon the second defendant under O 62 r 4(1)(b) of the RHC. The delay in setting aside the judgment in default would also be more than a year for the service effected through TB 265.

[55] Counsel for the plaintiff contended that the judgments had been properly served at the business addresses of the defendants. The defendants contended that the plaintiff had sent the notice of demand with the judgment to the wrong address which is not its registered office.

[56] In the case of *Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors* [2002] 7 MLJ 430; [2002] 2 AMR 1724, it was held that 'within 30 days of receipt of the judgment or order by him' even though the judgment was not meant to be served by virtue of O 62 r 10 could not be read as 'within 30 days after the defendant becomes aware of the judgment or order'. Based on the wording 'receipt' in O 42 r 13 of the RHC there must be actual service of a copy of the judgment upon the defendants before the 30 days period starts to run.

Order 62 rule 4 of the RHC applicability: Personal service

[57] It must be noted that the modes of service allowed by O 62 r 4 of the RHC seems to inexplicably limit its use for service of a writ to a corporation and not the wider term 'documents' as used in preceding rr 1 and 3 governing personal service on an individual for the other legal documents as listed in r 3.

[58] Does it mean that reliance cannot be had on O 62 r 4 of the RHC for the service of other legal documents to a company eg a summons in chambers arising from the writ (when no counsel has been appointed yet for the company), an originating petition or an order arising from the writ? Thereby with the result of limiting the acceptable methods of personal service of other documents to a company only through the statutory service under s 350 of the Companies Act 1965 as contended by counsel for the defendants.

[59] Order 62 r 4(1) of the RHC 1980 states that 'the writ may be served' on a locally registered company by three ways:

(a) leaving at registered office;

(b) by sending a copy of it by registered post addressed to the corporation, or, if there be more offices than one at the principal office of the corporation; or

(c) handing it to the company's secretary or the director of other principal officer.

[60] It is interesting to note that currently the position of service on a company in UK where no address of service is given according to their White Book at r 6.2(2): the company must be served all documents by the method as allowed by their r 6.5(6), ie in UK, all documents are now to be served at the principal office of the company or any place of business of the company which is in addition to the statutor method at its registered office. Our rules unfortunately still maintains the old wording of service of a writ.

[61] Our s 350 of the Companies Act 1965 also states that:

> 350 Service of documents on company
>
> A document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

[62] Document is defined by s 4(1) of the Companies Act 1965 as to 'includes summons, order and other legal process, and notice and register;'

[63] From O 62 r 4(1) of the RHC 1980 and s 350 of the Companies Act 1965, it must be noted that the wording for the prescribed modes of service on a company is 'may' and not the mandatory 'shall' presupposing correctly that there are other alternative methods of service that can be used and just as efficacious. For example for service of writ in pursuance of contract under O 10 r 3(1)(b) of the RHC. This recognises and allows contractually provided mode of service of the writ on a company as effective.

[64] I would add here another example of good service will be on an attorney or designated agent of a company duly authorised to accept service on behalf of the company which is also just as good as service in addition to these prescribed modes of service. The service on a local agent is recognised by O 10 r 2 of the RHC for foreign principals to dispense with service out of jurisdiction.

[65] However, when we read the wording of the title and O 10 r 3(1)(b) of the RHC itself, it seems to only approve 'Service of the writ pursuance of contract'; does it mean that other process arising from the same writ like service of the judgment on the company or other originating process cannot comply with the terms of the contract but will have to follow the prescribed modes of service? I think not because it cannot be the intention of O 10 r 3(1)(b) of the

RHC to redraw the agreement of the litigating parties to limit the agreed mode of contractual service to the writ only when as here, by section 19.1(a) of the facility agreement it is extended to cover all legal process. 'Legal Process' is defined by section 2.1 of the facility agreement to include 'orders and such documents … which are required to be served under the Rules of the Court'.

[66] The better view and interpretation is that the use of the word 'writ' here can be read and is meant to include other documentation arising from the writ like the judgment from it and should not be read restrictively as to mean the writ singularly for the purposes of effecting service thereof by O 10 r 3(1)(b) and also enabling O 62 r 4(1) of the RHC 1980 to be applied to all other documents for service on a company instead of limited to writs.

Order 62 rules 1 and 6(1) and (2) of the RHC: No personal service required

[67] Be that as it may, for the purpose of this case, a judgment or order for payment entered by the plaintiff against the defendants which does not specify the time it is to be paid is not enforceable by committal unlike those coming under O 45 r 1(1)(e) of the RHC applies. Order 45 r 13(1) of the RHC also provides that such judgment or order for recovery of money is not enforceable by committal. Where O 45 r 5 of the RHC applies, which covers an order to do an act within a specified time any default of which will result in committal proceedings, then personal service is required of such kind of order according to O 45 r 7 of the RHC.

[68] The notes to the *Malaysian Court Practice, High Court II*, (2007 Desk Ed) at note 62.1.5 specifically lists out the documents where personal service is required and this only includes an order to do an act that is intended to enforce by committal under O 45 r 7.

[69] Order 62 rule 1 states:

> Any document which by virtue of these rules is required to be served on any person need not be personally served unless the document is one which by an express provision of these rules or by order of the Court is required to be so served.

[70] A judgment or order as entered by the plaintiff against the defendants for the judgment debt for payment without any specified direction for action is not within the class of documents that needs to be personally served like a writ or an order the failure to act on which will result in committal, see example under O 45 r 7(3) on requirement of the mode of personal service on a body corporate is a requisite requirement before committal proceedings can proceed.

[71] In this respect reference is made to O 62 r 6(1) and (2) on the modes of service available if no personal service is required:

> (1) Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally, may be effected —
>
> (a) by leaving the document at the proper address of the person to be served; or
>
> (b) By prepaid registered post; …
>
> (2) For the purposes of this rule, and of section 2 of the Interpretation Act, 1967, in its application to this rule, the proper address of any person on whom a document is to be served in accordance with this rule shall be the address for service of that person, but if at the time when service is 10 effected that person has no address for service his proper address for the purposes aforesaid shall be —
>
> (d) in the case of a body corporate, the registered or principal office of the body.

[72] Though counsel for the defendants alleged that there has been no service of the sealed judgment to the defendants, the plaintiff had adequately covered this point in paras 5–6 of their affidavit in opposition by evidence of posting by AR registered post to the defendants business address TB 265 which lead to the winding up proceedings which itself was served at TB 265 and which have not or could not be rebutted by the defendants.

[73] The plaintiff had served the letter of demand for the judgment debt including the judgment by registered post to the defendants at their business address TB 265 which has been ruled before as their respective principal office for service of the writ and other documents.

[74] Based on O 62 r 6(1) and (2) of the RHC, the service of the judgment upon the defendants at their business address or principal office at TB 265 will be sufficient and that the failure to serve at the registered office is not mandatory.

Delay in setting aside

[75] There is no explanation offered by the defendants on their delay in not applying to set aside the judgment in default within the 30 days limitation except for the challenge that a copy of the judgment had not been given to them. In *Tan Chong Soon v Ng Kin Hwa* [2001] MLJU 580; [2002] 5 CLJ 195 a delay of 328 days without any explanation as to the reasons for the delay was

deemed inordinate as to have the application to set aside dismissed.

Even if no service

[76] Even if the defendants had not been served a copy of the judgment, counsel for the plaintiff further contended that the judgment was brought to the defendants' attention more than five months before their application when the winding up notices (exhs CLF1(a) and (b) of the defendants' affidavit in support) were served on them. The winding up notices were founded on the judgment which the second defendant through its letter of settlement dated 9 September 2008 (exh ASM10 of the plaintiff's affidavit in opposition) had acknowledged the judgment for the purposes of proposing a settlement.

[77] According to paragraph 10 of the defendants' affidavit in support, the defendants' counsel had apparently extracted a copy of the judgment sometime in October 2008. By that date the defendants were fully aware and had access to the proceedings against them by the plaintiff.

[78] If service of the judgment at the business address is not adequate, in view of the circumstances here in that the defendants were fully aware of the judgment by the time the winding up notices were served on them to the extent of being able to propose a settlement, yet they remained dilatory without any explanation for the delay in the pursuit of their rights to set it aside under O 42 r 13 of the RHC for more than five months after their counsel had requested for information about the writ and the judgment by his letter dated 15 September 2008, exhs CLF12(a) and (c) of the defendants' affidavit in reply and had in fact shortly thereafter extracted a copy of the judgment from the court. The plaintiff had also contended that the defendants by their action had waived their rights for requiring service of a copy of the judgment in particular when through their letter of settlement dated 9 September 2008 (exh ASM10 of the plaintiff's affidavit in opposition), proposing terms to pay the judgment debt.

[79] If necessary, I think this is a fit and proper case for me to exercise my discretion under O 62 r 1(1) of the RHC to dispense with service of a copy of the judgment in default upon the defendants under the circumstances as no prejudice has been visited on them by the non-service of a copy of the judgment in default and apparent waiver. Though I might add that this is not condonation of the 'plaintiff's solicitors' role in the matter in relation to the treatment of the defendants' solicitors requests for a copy of the judgment if they did in fact ignored their request as alleged by the defendants.

Non-compliance with O 42 r 13 of the RHC

[80] The defendants' application to set aside the judgment in default has

therefore failed by their non-compliance of O 42 r 13 of the RHC and in such a case whether the defendants had merits in its proposed defence is irrelevant (*Anthony Goh Khiok Loong (suing by his father and next friend, Goh Kok Hua) v Chan Yam Heng & Anor* [2007] 1 MLJ 140; [2006] 7 CLJ 309).

DISMISSAL OF THE DEFENDANTS' APPEAL

[81] On the above grounds the appeal against the dismissal of the defendants' application to set aside the judgment in default by the senior assistant registrar is therefore dismissed with costs.

Appeal dismissed with costs.

Reported by Kohila Nesan